No. 80572-5

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

(Court of Appeals No. 57523-6-I)

MARTIN SCHNALL, et al.,

Respondents,

v.

AT&T WIRELESS SERVICES, INC.,

Petitioner.

AMICUS CURIAE MEMORANDUM OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITION FOR REVIEW

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I. INTRODUCTION

The Chamber of Commerce of the United States of America submits this memorandum in support of AT&T Wireless's Petition for Review. This case satisfies RAP 13.4(b)(4) because it presents two questions of substantial public interest to businesses and consumers:

First, the Court should settle the ongoing debate over the standard for pleading and proving causation in private CPA actions seeking "actual damages sustained." The Court of Appeals held that a business can be liable for actual damages "caused" by a deceptive practice even if the consumer has not been deceived. This decision runs counter to this Court's precedents, as well as a large body of state and federal case law.

Second, this Court should consider whether Washington law should govern claims asserted by out of state consumers against Washington businesses with respect to relationships centered in the consumers' home states. Washington has no interest in regulating the conduct of Washington businesses in other states where that conduct may be lawful. By contrast, every state (including Washington) has a strong interest in protecting consumers with respect to sales within its borders.

II. REASONS FOR GRANTING REVIEW

A. The Court Should Settle Important Questions as to the Standard for Proving Causation under the CPA.

The Court of Appeals held that a private party seeking money damages may establish causation in a deceptive practices case under the Consumer Protection Act ("CPA") without showing that ***anyone*** was deceived. *See Schnall v. AT&T Wireless Servs., Inc.*, 161 P.3d 395, 401

¶17 (Wash. App. 2007). As long as the plaintiff shows that the challenged practice has ***the capacity*** to deceive, the Court of Appeals wrote, "it is enough to establish causation that they purchased the service" that was the subject of the alleged deception. *Id.*; *see also id.* at ¶ 15 (quoting *Pickett v. Holland-America Line Westours, Inc.*, 101 Wn. App. 901, 920 (2000), *rev'd*, 145 Wn.2d 178 (2001) ("*Pickett I*")).[1]

This formulation of the CPA causation element departs from prior cases in a way that adversely affects every company that does business in Washington. Because this Court six years ago called the issue debatable, and because courts and academics around the country have continued to debate it, this Court should accept review under RAP 13.4(b)(4).

1. This Court Has Construed the CPA to Require Proof that Deceptive Conduct Induced Action That Led to Actual Damages.

The CPA's requirement of a causal link between deceptive conduct and a plaintiff's damages inheres in the statutory language. When the Legislature created a private right of action in 1970 – until then, only the Attorney General could sue – it emphasized that only a person "injured in his [or her] business or property by a violation of the statute" could sue to recover "actual damages sustained," ***not*** restitution or statutory penalties.

[1] Division I suggested that a court may presume reliance in a case involving "omissions" or a failure to disclose. *See Schnall*, 161 P.3d at 401 ¶ 16 (citing *Morris v. International Yogurt Co.*, 107 Wn.2d 314, 327-28 (1986)). The Court of Appeals' breezy treatment of this presumption reflects a misunderstanding of its proper use, which this Court should correct on review. Except in the unique context of an efficient securities market, a rebuttable presumption of reliance requires proof that the plaintiff did not know the omitted facts, the defendant had a duty to disclose, and the plaintiff relied on a statement from which the facts had been omitted. Unlike Mr. Schnall, plaintiffs in *Morris* had established each of those factors through individual proof. *Morris*, 107 Wn.2d at 327-28.

1970 Wash. Laws, 1st ex. sess., ch. 26 § 2 (codified at RCW 19.86.090).

Washington courts understood that a plaintiff could not recover "actual damages" for deception in the air; instead, the courts required a causal link between the unlawful conduct and the resulting loss. In *Anhold v. Daniels*, 94 Wn.2d 40 (1980), the Court held that private CPA plaintiffs could not recover damages unless they showed that a defendant's wrongful conduct ***induced*** them to take action. Although *Anhold* framed this as part of the "public interest" element, other decisions made clear that plaintiffs could not recover "actual damages" for deception without showing causation in fact, i.e., that they had been deceived. *See Transamerica Title Ins. Co. v. Johnson*, 103 Wn.2d 409, 418 (1985) (no causation where "there was no reliance shown"); *Smith v. Olympic Bank*, 103 Wn.2d 418, 425 (1985) (defendant's wrongful act "neither induced the [injured party] to act nor to refrain from acting"); *Nuttall v. Dowell*, 31 Wn. App. 98, 111 (1982) (no "causal relationship" unless plaintiff "convince[s] the trier of fact that he relied upon" misrepresentation).

Building on this foundation, this Court in *Hangman Ridge Training Stables v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 793-94 (1986), recognized causation as one of the five elements of a CPA damages claim. *Hangman Ridge* held that a private CPA plaintiff must prove "a causal link ... between the unfair or deceptive acts and the injury" alleged.[2] The

[2] Contrary to Mr. Schnall's argument, Answer at 7-8, none of the cases suggested that plaintiffs could recover ***damages*** just by showing that they saw or heard something that had "the capacity to deceive." The "capacity to deceive" has always defined whether a practice is unfair or deceptive; it has never defined causation, as *Hangman Ridge* made clear. *See Hangman Ridge*, 105 Wn.2d at 793-94.

Court noted that earlier decisions foreshadowed the causation element, citing with approval CPA decisions that recognized the need to show causation and strongly implied a reliance requirement. *Hangman Ridge*, 105 Wn.2d at 793 (citing *Transamerica*, *Smith* and *Nuttall*). These cases followed the settled principle that if a "misrepresentation has not in fact been relied upon by the recipient in entering into a transaction in which he suffers pecuniary loss, the misrepresentation is not in fact a cause of the loss." RESTATEMENT (SECOND) OF TORTS § 546, cmt. a (1979).

2. After *Pickett*, the Proper Reading of the CPA's Causation Requirement Is at Least "Debatable."

In 2000, Division I broke from this pattern. In *Pickett v. Holland-America Line Westours, Inc.*, 101 Wn. App. 901, 919 (2000), Judge Appelwick wrote that a CPA plaintiff did ***not*** need to show reliance, inducement, or ***any*** relationship between the deceptive conduct and the plaintiff's entry into the transaction. Instead, Division I held that CPA "causation inheres in the fact that plaintiffs purchased" a product as to which the seller engaged in deceptive practices. This Court, however, reversed. Without reaching the question whether a plaintiff could recover "actual damages" for deception without being deceived, the Court held that the standard for causation in CPA cases presented a "debatable question without a clear answer under Washington law." *Pickett v. Holland-America Line Westours, Inc.*, 145 Wn.2d 178, 197 (2001).[3]

[3] This Court cited Justice Pearson's opinion in *Nuttall* "for the proposition that actual reliance is required in a money damages CPA claim based on misrepresentation" and called it "the only Washington authority directly on point." *Pickett*, 145 Wn.2d at 196. The Court also noted that the cases on which Division I relied in *Pickett I – Edmonds v.*

Washington courts thereafter returned to the reading of the CPA that prevailed before *Pickett I.* In *Mayer v. Sto Inds., Inc.*, 123 Wn. App. 443, 458 (2004), *rev'd on other gds.*, 156 Wn.2d 677 (2006), for example, Division II held that a plaintiff proves causation if he shows "that he relied on a misrepresentation of fact" or that the "defendant [has] induce[d] a plaintiff to act or refrain from acting," citing *Nuttall* and *Anhold.* In *Sheldon v. Preferred States Ins.*, 123 Wn. App. 12, 18 (2004), Division I applied a reliance-type analysis in affirming summary judgment in a proposed CPA class action. In federal court, Chief Judge Lasnik in *Davis v. Homecomings Financial*, 2006 U.S. Dist. LEXIS 77381 (W.D. Wash. Oct. 10, 2006), held that "to establish a violation of the CPA, a plaintiff must show that he or she relied on [the defendant's] allegedly unfair or deceptive acts." *Id.* at *24 (citing *Pickett*). *See also Anderson v. Corinthian Colleges, Inc.*, 2006 U.S. Dist. LEXIS 43770, *7-*8 (W.D. Wash. May 25, 2006) (same). *But see Pierce v. Novastar Mortgage, Inc.*, 238 F.R.D. 624, 629-30 (W. D. Wash. 2006) ("proof of reliance is not necessary in order to satisfy the CPA's causation element").

In short, Division I's decision leaves Washington law unsettled.

3. Other Courts Have Reached Conclusions Contrary to the Court of Appeals Here.

Although plaintiffs portray Division I's decision as a predictable result based on settled principles, courts in other jurisdictions have

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John L. Scott Real Estate, 87 Wn. App. 834 (1997), and *Mason v. Mortgage America, Inc.*, 114 Wn.2d 842 (1990) – did ***not*** "directly" stand for the propositions for which Division I cited them. *Pickett*, 145 Wn.2d at 197. Despite this, the Court of Appeals again relied on *Edmonds* and *Mason* here. *See Schnall*, 161 P.3d at 400 ¶ 13.

resolved the question presented here exactly opposite to the Court of Appeals. For example, the Truth in Lending Act ("TILA") requires disclosures in consumer credit transactions and, like the CPA, affords a remedy allowing recovery of "actual damage sustained." 15 U.S.C. § 1640(a)(1). The federal courts of appeals – including the Ninth Circuit – "have held that detrimental reliance is an element in a claim for actual damages" under TILA. *Turner v. Beneficial Corporation*, 242 F.3d 1023, 1026 (11th Cir. 2001) (citing First, Fifth, Sixth and Eighth Circuits); *In re Smith*, 289 F.3d 1155, 1157 (9th Cir. 2002). The reliance requirement "establish[es] a causal link between the [defendant's] noncompliance and [the plaintiff's] damages." *Turner*, 242 F.3d at 1028.

The leading state case is *Oliveira v. Amoco Oil Co.*, 776 N.E.2d 151 (Ill. 2002), in which a consumer sued under the Illinois version of the CPA, alleging that Amoco deceptively advertised its premium gas. Like Mr. Schnall, the plaintiff urged that consumers suffered damage if they bought Amoco premium gas, regardless of whether they saw or believed the advertisements. The Illinois Court observed that "[u]nder plaintiff's 'market theory' of causation, purchasers of defendant's premium gasoline who saw the ads but never believed them, i.e., those who 'knew the truth,' nevertheless [would] have valid claims under" the Illinois consumer fraud act. *Id.* at 164. Rejecting this expansion of the statute, the court held that to "plead the element of proximate causation in a private cause of action for deceptive advertising brought under the Act, a plaintiff must allege that

he was, in some manner, deceived." *Id. See also Weinberg v. Sun Co., Inc.*, 777 A.2d 442, 446 (Pa. 2001) (no recovery under deceptive practices law "when the plaintiff was neither deceived nor influenced").[4]

As these cases show, if a consumer knows the truth and chooses to buy a product anyway (in this case, for example, if a consumer knew or did not care that the UCC would be passed on), the consumer has not suffered "actual damages" and has no CPA claim. Plaintiffs will disagree. But for now, it is enough to say that the matter has been the subject of debate, in Washington and across the country, and it has led to uncertainty for litigants and courts. *See* Sheila B. Scheuerman, "The Consumer Fraud Class Action: Reining in Abuse by Requiring Plaintiffs to Allege Reliance as an Essential Element," 43 HARV. J. ON LEGIS. 1 (Wint. 2006).

B. The Court Should Settle Important Questions about the Application of the CPA to Non-Residents' Claims.

The Court of Appeals held that Washington law should govern the claims against AT&T Wireless by residents of all 50 states, essentially because the company's headquarters were in Washington and it conducted business activities here while providing service across the country. *Schnall*, 161 P.3d at 402-03 ¶ 21. This Court should accept review to

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[4] Unlike these courts, Division I suggested that Washington should relax causation to facilitate CPA class actions. *Schnall*, 161 P.3d at 400-01 ¶¶ 15-17. But "the right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims." *Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, 332 (1980). Thus, the pursuit of a class claim cannot "abridge, enlarge or modify any substantive right." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613 (1997). To alter "the substantive law to accommodate procedure would be to confuse the means with the ends – to sacrifice the goal for the going." *Washington Mut. Bank, FA v. Superior Court*, 15 P.3d 1071, 1079 (Cal. 2001); *Henry Schein, Inc. v. Stromboe*, 102 S.W.3d 675, 693 (Tex. 2002) (CPA reliance requirement "in no way altered by the assertion of claims on behalf of a class").

decide whether Washington companies should be subject to a choice of law test that departs from prevailing law, in a way that makes them more susceptible to national class actions than other states' businesses.

When plaintiffs seek a nationwide class, "choice-of-law constraints are constitutionally mandated because a party has a right to have her claims governed by the state law applicable to her particular case." *In re Prempro Prods. Liab. Litig.*, 230 F.R.D. 555, 562 (E.D. Ark. 2005). The constitution dictates that a class member's claim be judged under the law of a jurisdiction with constitutionally significant contacts with her case. *Pickett*, 145 Wn.2d at 198 (citing *Phillips Petroleum v. Schutts*, 472 U. S. 797, 821-22 (1985)).[5] Further, once a plaintiff satisfies constitutional standards, policy considerations inform the choice of law determination. This Court should accept review to provide guidance on important policy and constitutional considerations, which the Court of Appeals overlooked:

First, absent an enforceable choice of law clause, consumers expect to have their claims decided under their home state's law, not under the law of the home state (or country) of the company that dealt with them. In *In re Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig.*, 288 F.3d 1012 (7th Cir. 2002), for example, the Seventh Circuit reversed an

[5] Where class claims implicate the law of many states, "the burden rests upon the party seeking nationwide class certification to identify any variations of applicable state law and to meaningfully demonstrate how a trial on the class causes of action can be conducted fairly and efficiently in light of those variations." *Washington Mut. Bank FA v. Superior Court*, 15 P.3d 1071, 1086 (Cal. 2001). A "court cannot accept such an assertion [of uniform state law] 'on faith.' [Plaintiffs], as class action proponents, must show that it is accurate." *Walsh v. Ford Motor Co.*, 807 F.2d 1000, 1016 (D.C. Cir. 1986) (Ruth Bader Ginsburg, J.) (denying certification). Courts have "overwhelmingly rejected" certification in these circumstances. *Henry Schein*, 102 S.W.3d at 698.

Indiana court's ruling that it could apply Michigan consumer protection law to Ford and Tennessee consumer protection law to Firestone because their respective corporate headquarters were located in those states, and decisions and disclosures emanated from those states. The court wrote:

> We do not for a second suppose that Indiana would apply Michigan law to an auto sale if Michigan permitted auto companies to conceal defects from customers; nor do we think it likely that Indiana would apply Korean law (no matter *what* Korean law on the subject may provide) to claims of deceit in the sale of Hyundai automobiles, in Indiana, to residents of Indiana, or French law to the sale of cars equipped with Michelin tires. ... It follows that Indiana's choice-of-law rule selects the 50 states and multiple territories where the buyers live, and not the place of the sellers' headquarters, for these suits. ... Differences across states may be costly ... but they are a fundamental aspect of our federal republic and must not be overridden in a quest to clear the queue in court.

Id. at 1018, 1020.[6]

Second, Washington has no interest in punishing a Washington business for conduct that is legal where it occurs and its effects are felt. Thus, if Oregon allows a wireless carrier to present a charge in a particular way, Washington should not make a Washington-based carrier liable for following the Oregon rule in Oregon. As one court of appeals explained:

> [W]hat is unlawful in Illinois ... may not be unlawful in another state. Illinois may not impose sanctions on violators of its law with the intent of changing the violator's conduct in other states if it was lawful where it occurred and had no impact on Illinois or its residents.

Oliveira v. Amoco Oil Co., 726 N.E.2d 51, 61-62 (Ill. App. 2000), *rev'd on*

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[6] *See In re Relafen Antitrust Litig.*, 221 F.R.D. 260, 277-78 (D. Mass. 2004); *In re Vioxx Prods. Liab. Litig.*, 239 F.R.D. 450, 456 (E.D. La. 2006); *Tracker Marine, L.P. v. Ogle*, 108 S.W.2d 349, 357-58 (Tex. App. 2003).

other gds., 776 N.E.2d 151 (Ill. 2002) ("*Oliveira I*").

Third, under traditional choice of law tests, "defendant's contacts alone do not determine whether [Washington] law will be applied." *Oliveira I*, 726 N.E.2d at 61; *see In re Ford Motor Co. Bronco II Prods. Liab. Lit.*, 177 F.R.D. 360, 371 (E.D. La. 1997) (rejecting arguments that Michigan law should apply to class case against Ford). For claims involving allegedly deceptive conduct, the Restatement identifies five considerations relevant to choice of law. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 148(2) (1971). The vast majority of courts have held that this test favors application of the law of the state where each consumer entered the contract, suffered the alleged deception, resided, and received the services. *See In re Bridgestone/Firestone*, 288 F.3d at 1018.

This Court should accept review to decide whether Washington law should depart from generally-recognized principles in order to make Washington companies more susceptible to nationwide class actions than their competitors in other states.

III. CONCLUSION

For these reasons, the Chamber urges the Court to grant review.

RESPECTFULLY SUBMITTED this 17th of September, 2007.

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